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IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

vs.

PALM BEACH COUNTY CANVASSING BOARD, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF AMICI CURIAE SUPPORTING PETITIONER OF WILLIAM H. HAYNES, CONNIE MENDEZ, MARNEE BENZ, BERT CARRIER, et al.

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* This brief is filed with the consent of the parties. Counsel for the parties have filed blanket letters of consent with the Office of the Clerk.

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STATEMENT OF INTEREST OF AMICI

The Amici, who are identified by name in the Addendum to this Brief, are registered Florida voters who did, in fact, cast their ballots in the November 7, 2000, presidential election. By operation of the United States Constitution and Florida statutes, Amici were entitled to participate in that election and have Florida's electors appointed in the manner directed by the Florida legislature before the election, by which means the Florida legislature has provided for the appointment of its presidential electors. The right of these voters to participate in that electoral process was compromised by the intervening Florida Supreme Court's decision. That decision changed the statutory procedures for the election after the election day and before the results were certified, *i.e.*, in the midst of the election process.[1]

SUMMARY OF ARGUMENT

The Constitution expressly delegates to state legislatures the authority to determine the manner for the appointment of electors. *See* Art. II, § 1, cl. 2. The Florida Legislature provided a detailed statutory mechanism for the appointment of electors only to have its statutes rewritten after the fact by the Florida Supreme Court in the decision below. That decision deprives Petitioner and Amici of their federal rights to have Florida appoint its electors in the manner directed by the Florida Legislature before Amici cast their votes. *See* Art. II, § 1, cl. 2; 3 U.S.C. § 5. This Court has jurisdiction to review the Florida Supreme Court's denial of federal rights specifically claimed by Petitioner. *See* 28 U.S.C. § 1257.

The text and history of Art. II, § 1, cl. 2, as well as subsequent judicial decisions, all make clear that state

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[1] No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

legislatures enjoy virtually plenary and exclusive authority over the appointment of electors. As a result, state-court decisions that ignore or override statutory provisions governing the appointment of electors raise issues of constitutional magnitude. Such decisions cannot stand as the final word in light of the Constitution's express direction that state legislatures, not state courts, have the preeminent authority to appoint electors. However, the decision below features precisely the kind of judicial overreaching that Article II forbids. The decision below reverses the import of key statutory terms and rewrites statutory deadlines.

To makes matters worse, the Florida Supreme Court applied this new legislation retroactively in contravention of 3 U.S.C. § 5. Article II grants state legislatures the preeminent role in the appointment of electors, and 3 U.S.C. § 5 imposes a limitation on retroactive lawmaking. The Florida Supreme Court's judicial lawmaking violated both these provisions simultaneously. This Court should vindicate Petitioner's and Amici's rights under Art. II, § 1, cl. 2 and 3 U.S.C. § 5.

ARGUMENT

The Florida Legislature enacted, pursuant to Art. II, § 1, cl. 2, a thorough and straightforward legislative scheme governing the appointment of electors. The Florida Supreme Court did not merely interpret this statutory scheme, it wrote it anew. The Florida Supreme Court set forth its own legislation, disregarding the judgments of the Florida Legislature and substituting its own.

If this statutory scheme that addressed a matter of only local concern, such judicial lawmaking could not justify this Court's intervention. But this case involves a matter of surpassing national importance. Art. II, § 1, cl. 2 prevents this

judicial arrogation and reserves the manner of selecting electors to the legislatures of the several states. As this Court has explained in *Hawke v. Smith*, 253 U.S. 221, 227 (1920), "that was not a term of uncertain meaning when incorporated into the constitution. What it meant when adopted it still means for the purposes of interpretation. A legislature was then the representative body which made the laws of the people."

The Florida Supreme Court is not a "representative body." For this reason, the framers rejected any direct role for the state judiciaries in the appointment of electors. *See infra.* Here, however, the Florida Supreme Court enacted new "legislation" out of thin air. It adopted new deadlines guided not by the popular will, but by nothing more than its "equitable" discretion.

In the end, this post hoc judicial lawmaking solved nothing, but instead lengthened the window for political instability and unrest. This Court should vindicate the wisdom of the Framers and reaffirm the preeminent authority of the Florida Legislature.

I. THIS COURT HAS JURISDICTION TO VINDICATE PETITIONER'S AND AMICI'S FEDERAL RIGHTS TO HAVE FLORIDA'S ELECTORS APPOINTED PURSUANT TO THE RULES ESTABLISHED BY THE FLORIDA LEGISLATURE

This Court clearly possesses jurisdiction over this case because the Florida Supreme Court rejected a "right, privilege, or immunity . . . claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257. Petitioner argued below that the Florida Supreme Court could not reject the rules and deadlines imposed by the Florida Legislature and substitute its own deadlines without violating,

inter alia, Art. II, § 1, cl. 2, and 3 U.S.C. § 5. The Florida Supreme Court implicitly rejected those arguments and infringed on Petitioner's federal rights.

The Florida Supreme Court likewise denied Amici's rights under Art. II, § 1, cl. 2, and 3 U.S.C. § 5 to have the electors from their State appointed "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. As explained *infra*, Art. II, § 1, cl. 2, grants both Petitioner and Amici a federal constitutional right to have Florida electors in the electoral college appointed in accordance with the laws enacted by the Florida Legislature. By misinterpreting the relevant Florida statutes, ignoring deadlines clearly imposed by the Florida Legislature, and creating new deadlines out of whole cloth, the decision below deprives Petitioner and Amici of federal rights. 28 U.S.C. § 1257 vests this Court with jurisdiction to correct that denial of federally-protected rights.

It is no answer for Respondent to insist that the Constitution leaves election matters to the States. This Court repeatedly has emphasized that all federal elections, especially presidential elections, implicate important federal interests. *See, e.g., Burroughs v. United States*, 290 U.S. 534, 547 (1934) (acknowledging the "clear" federal interest in "protect[ing] the election of [the] President and Vice President from corruption"); *Ex parte Yarbrough*, 110 U.S. 651, 666, 662 (1884) (noting the federal government's "essential" interest in ensuring "that the votes by which its members of congress and its president are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice").

The more fundamental problem with Respondents' suggestion is that Art. II, § 1, cl. 2, grants authority over the

appointment of electors not to the State as an undifferentiated sovereign, but specifically to "the Legislature thereof."[2] Indeed, the gist of Petitioner's complaint is that the decision below deprived Petitioner of his federal right to have electors appointed as directed by the Florida Legislature, as opposed to the Florida Supreme Court.

Under these circumstances, it makes no sense to suggest that this Court lacks jurisdiction because the Constitution leaves the matter to the States. Art. II, § 1, cl. 2, not only specifies that state legislatures shall adopt the rules for the appointment of electors, but further disqualifies any "Senator or Representative, or person holding an office of trust or profit under the United States" from service as an elector. It seems clear that this Court would have jurisdiction to review a state court decision authorizing a Senator to serve as an elector. The Court possesses the identical jurisdiction to review the Florida Supreme Court's decision authorizing a mechanism and schedule for the appointment of electors at variance from that specified by the Florida Legislature.

As developed *infra*, Petitioner and Amici possess a federal right to have Florida's electors appointed pursuant to the process established by the Florida Legislature. Although federal electors and voters in federal elections are not federal

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[2] Respondents suggest that this Court does not impose separation of powers requirements on the States and generally allows the States to allocate power internally as they see fit. *See* Opp. Cert. at 18 n.5. This observation may hold true in the many instances where the Constitution makes general reference to the States. However, the Court has rejected this principle in the relatively few instances in which the Constitution imposes rights and obligations on specific institutions of state government, such as state legislatures. *See Hawke v. Smith*, *supra* (rejecting Ohio's efforts to transfer the constitutional role of the state legislature in the amendment ratification process to the people in a referendum).

officers, they do perform a federal function. *See, e.g., Ray v. Blair*, 343 U.S. 214, 224 (1952); *Burroughs*, 290 U.S. at 545; *Yarbrough*, 110 U.S. at 662. If state laws allegedly interfere with the right to perform that federal function as permitted under federal law, this Court has jurisdiction to vindicate the federal right. In *Ray*, for example, a potential presidential elector asserted a federal right not to be bound by a state law requirement that electors pledge to support the candidate nominated by the party's national convention. Although the Court ultimately rejected the asserted federal right, it asserted jurisdiction "based on this federal right specifically claimed by respondent." *Ray*, 343 U.S. at 216 (citing 28 U.S.C. § 1257(3)). Here, Petitioner and Amici claim the federal right to have the Florida electors appointed according to the process established by the Legislature. That claimed federal right vests this Court with jurisdiction.

Respondents suggest that this Court lacks jurisdiction to review what is essentially an issue of state law. However, in a variety of contexts, this Court will wade into state-law disputes when necessary to vindicate federal rights. For example, on numerous occasions, this Court has intervened to vindicate a litigant's federal right to have state courts give a prior state or federal-court judgment full faith and credit. *See, e.g., West Side Belt R.R. Co. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 99 (1911); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641 (1900) (noting that for the Court to have jurisdiction there must be "some alleged denial of a right or immunity secured by [the] Constitution"); *Crescent City Live-Stock Landing & Slaughter-House v. Butchers' Union Slaughter House & Live-Stock Landing Co.*, 120 U.S. 141, 146 (1887); *Dupasseur v. Rochereau*, 88 U.S. 130, 134-35 (1874). In such cases, this Court reviews the asserted deprivation of a

federal right, even though it generally requires the Court to undertake an extensive analysis of the state law of judgments. In *West Side Belt Railroad*, for example, this Court affirmed its jurisdiction to determine whether the Pennsylvania state courts had given a prior federal-court judgment full faith and credit even though the Court acknowledged "that the effect of the [Pennsylvania Legislature's] act of May 23 constitutes 'the real and only issue in the case.'" 219 U.S. at 102 (citation omitted). The Court's observation applies to this case: "When a party asserts that due faith and credit have not been given to [there, a judgment; here, the procedures specified by the Florida Legislature], he asserts a right under the Constitution of the United States, and necessarily this raises a Federal question." *Id.* at 99.

This Court also exercises jurisdiction to ensure that a state-law interpretation of a state tax provision does not deny a federal entity's immunity from state taxation. In *Diamond Nat'l Corp. v. State Bd. of Equalization*, 425 U.S. 268 (1976) (per curiam), this Court held a national bank immune from state and local sales taxes, despite the state supreme court's state-law determination that the incidence of the tax fell on a non-federal party. As the dissent acknowledged, "[s]ince the case involves a federal claim of immunity from state taxation, we are not bound by the California court's determination." *Id.* at 269 (Stevens, J., dissenting).

This Court has not hesitated to intervene when States set the rules for federal elections in a manner that allegedly violated federal law.[3] *See, e.g., Williams v. Rhodes*, 393 U.S.

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[3] Indeed, at least one court has gone so far as to treat laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, as federal laws. *See Case of Electoral College*, 8 F. Cas. 427, 432-34 (C.C.D.S.C. 1876) (partially unpaginated). That view of the laws in dispute would

23, 28 (1968) (noting that suggestion that dispute over Ohio's limitations on access to the presidential ballot was non-justiciable "requires very little discussion" because it "has been rejected in cases of this kind numerous times"); *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892) (rejecting the argument that dispute concerning Michigan's procedure for appointing electors was a non-justiciable political question). In *Williams*, for example, the Court emphasized that although the States enjoyed "extensive power . . . to pass laws regulating the selection of electors," such "powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." 393 U.S. at 29.

In short, there is nothing objectionable or anomalous about this Court reviewing a state-law determination to ensure that the court below did not interpret state law in a manner that infringed on rights, privileges, or immunities claimed under the Constitution or statutes of the United States. 28 U.S.C. § 1257 clearly grants this Court jurisdiction over such cases, and this Court has exercised that jurisdiction in cases raising issues of far less importance to the federal government and federal Constitution.

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remove any doubt as to this Court's authority to engage in plenary review to ensure that the decision below correctly interpreted the provisions adopted by the Florida Legislature to govern the appointment of electors.

II. THE COURT BELOW DEPRIVED PETITIONER AND AMICI OF THEIR FEDERAL RIGHT TO HAVE FLORIDA'S ELECTORS APPOINTED ACCORDING TO THE RULES AND DEADLINES ESTABLISHED BY FLORIDA'S LEGISLATURE

A. The Constitutional Text, History, and Subsequent Judicial Decisions All Give the Florida Legislature, not the Florida Courts, Authority over the Appointment of Electors.

The text of Art. II, § 1, cl. 2, the history of that provision's framing, and subsequent decisions of this Court and other state and federal courts all confirm that each State's Legislature possesses plenary and exclusive authority to determine the manner in which electors are appointed. When a state Legislature enacts laws to govern the appointment of electors, it exercises authority under Art. II, § 1, cl. 2. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995). If a state court fails to respect the Legislature's enactments and rewrites them in the service of its own view of the proper method for appointing electors, the court reverses the allocation of authority expressly provided by Art. II, § 1, cl. 2. Accordingly, state-court judicial legislation concerning the appointment of electors is not merely an unfortunate instance of judicial activism – it violates the federal Constitution.

Art. II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." This provision lodges authority not simply in the States but uniquely in the state legislatures. The Constitution does not leave the States free to decide how to allocate

authority over appointment of electors among their various branches of government. By resolving this question for each State, the Constitution pre-empts any state-law separation of powers questions. Whatever may be the division and balance of power among a State's branches of government on other matters, Art. II, § 1, cl. 2 guarantees that the appointment of electors remains under the control of the state legislature.

The history of the framing of Art. II, § 1, cl. 2 confirms what its text makes clear. Although the Framers disagreed as to the optimal method for selecting electors, they all agreed that the selection of electors was not a proper business for the state courts. The record of the framing and subsequent judicial decisions all confirm that the state legislature enjoys the primary authority over the appointment of electors, and in a dispute between the state legislature and the state courts, the legislature must prevail.

The Framers' express delegation to the state legislatures represented a deliberate and thoughtful accommodation between the views of those who favored direct popular election, those who favored election by the state legislatures, and those who preferred election by Congress. *See McPherson*, 146 U.S. at 28. The delegation also avoided subsidiary disagreements over whether States should apportion electoral votes by district or on a winner-take-all basis. *See id.* As this Court summarized in *McPherson*: "The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *Id.* While the Framers disagreed about the best method for choosing a President, they were of one mind that lodging such authority in the judiciary "was out of the

question." Madison, July 25, 1787 (*reprinted in* 5 Elliot's Debates on the Federal Constitution 563). Madison acknowledged that "[t]here are objections against every mode that has been, or perhaps can be, proposed," and addressed at length the advantages and disadvantages of various methods such as relying upon Congress, state legislatures, state executives, electors, and the people directly. *Id.* The impropriety of a judicial role, in contrast, was so clear to the Framers that it did not merit serious discussion. "The state judiciaries had not been, and he presumed would not be, proposed as a proper source of appointment." *Id.* at 564.

The early history of the Republic confirmed the preeminent role of the state legislatures in the appointment of electors. Although the electoral college did not function as the Framers envisioned in all its particulars, the state legislatures did exercise plenary authority over the appointment of electors in accord with the original design. From the beginning, "various modes of choosing the electors were pursued," and "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt." *McPherson,* 146 U.S. at 29. Indeed, appointment by the legislature itself, with no popular vote at all, was a common practice in the Nation's early history. *See id.* at 29-32; *see also, e.g.,* J. Story, Commentaries on the Constitution § 1466 (1833) (stating that the constitutionality of direct legislative appointment "has been firmly established in practice, ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate

upon it").[4] The Florida Legislature, for example, directly appointed electors without conducting a popular vote as late as 1868. *See McPherson*, 146 U.S. at 33. Despite this diversity of appointment methods, no record appears of any attempt by a state court to impose its own view concerning the manner for the appointment of electors upon the legislature. *See id.* at 35 (noting that "our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action").

McPherson leaves no doubt that the plenary and exclusive power concerning the appointment of electors resides in each State's legislature, and not any other branch of state government. The Court recognized that "the sovereignty of the people is exercised through their representatives in the legislature." *Id.* at 25. As a result, the Court reasoned that the state legislatures logically would possess authority over the appointment of electors even if Art. II, § 1, cl. 2, allocated that power to the States generally without specifying its delegation to the state legislatures. *See id.* However, this reasoning does not render the specific delegation to the state legislatures a nullity. As the Court explained, "the insertion of those words [specifying that such power resides in each legislature], operat[es] as a limitation upon the state in respect

[4] In the 108 years since it was handed down, this Court has never questioned its unanimous opinion in *McPherson*. In *Williams v. Rhodes, supra*, Justice Harlan reviewed the historical record of the adoption of Art. II, § 1, cl. 2, and expressly reaffirmed *McPherson*. *See* 393 U.S. at 42-45 & nn.3-7 (Harlan, J., concurring in the result). Justice Stewart, in dissent, relied upon *McPherson* to assert that each State remains "perfectly free under the Constitution to provide for the selection of its presidential electors by the legislature itself." *Id.* at 49.

of any attempt to circumscribe the legislative power." *Id.*[5] Accordingly, Art. II, § 1, cl. 2 expressly prevents a state court from overriding the state legislature's procedures and deadlines for appointing electors or otherwise "attempt[ing] to circumscribe the legislative power."

Art. II, § 1, cl. 2, is one of a relative handful of constitutional provisions that delegate authority to a specified governmental entity within the state government, as opposed to authorizing or prohibiting action by the States. This Court's interpretation of another of these provisions underscores that States do not remain free to reallocate authority that the Constitution specifically assigns.

The Constitution specifies that to become effective a proposed amendment must be ratified "by the Legislatures of three-fourths of the several states." U.S. Const. Art. V. In *Hawke v. Smith,* this Court unanimously rejected an attempt by a State to reallocate the ratification authority from the legislature to the people through the referendum process. The Court first observed that "Legislatures" "was not a term of uncertain meaning when incorporated into the Constitution," but rather referred to "the representative body which made the laws of the people." 253 U.S. at 227. The Court considered the other places in the Constitution where the term was used "with this evident meaning," and concluded that "[t]here can be no question that the framers of the Constitution clearly

[5] Still more emphatically, the Court quoted a Senate report that declared that the appointment of electors was "placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States." *Id.* at 34-35 (quoting S. Rep. No. 395, 43d Cong., 1st Sess. (1874)).

understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states." *Id.* at 227, 228. While Ohio's constitution required a referendum, the Court explained that the "act of ratification by the state derives its authority from the federal Constitution," *id.* at 230, and States do not have the power to reassign those constitutionally allocated functions. The States must follow the procedure specified by Article V.

The *Hawke* Court's reasoning applies equally here. When Florida's Legislature enacted the statutes that govern the appointment of electors, it was exercising its plenary authority derived from Art. II, § 1, cl. 2's specific command. Under that clause, neither the Florida Supreme Court nor any other instrumentality of the Florida government has any right to determine the manner in which Florida's electors are appointed.[6] Whatever may be the division and balance of power under the constitution or laws of Florida in other contexts, when it comes to Article II makes the Florida Legislature supreme over the Florida courts. By rewriting the Legislature's enactments below in the service of its own view of the proper method for appointing electors, the Florida Supreme Court reversed the allocation of authority expressly provided by Art. II, § 1, cl. 2. As explained *supra,* such state-court judicial legislation concerning the appointment of

[6] To be sure, the Florida legislature can assign a role to the Florida Supreme Court. However, when, as here, the parties dispute whether the Florida Supreme Court has exercised an implicitly delegated statutory interpretation function or arrogated authority that the Florida Legislature never intended to delegate, the Florida Supreme Court cannot have the last word as to whether the Florida Supreme Court acted *ultra vires*. If Petitioner is correct that the Florida Supreme Court exercised an authority never delegated to it, then the decision below represents a deprivation of federal constitutional rights that cannot be left unremedied.

electors does not merely raise issues of state law – that practice violates the federal Constitution.

In striking contrast to the Florida Supreme Court's arrogation of authority to decide the manner in which Florida's electors should be appointed, other States' supreme courts have confirmed the primacy of the state legislature in such disputes. In *State ex rel. Beeson v. Marsh,* 34 N.W.2d 279, 286 (Neb. 1948), for example, the Nebraska Supreme Court found that the petitioners had "failed to follow the procedure directed by the Legislature." The court then dismissed petitioners' argument that the statutory procedure violated the state constitution as "misconceiv[ing] the scope of article II, section 1 . . . and the powers therein granted to the Legislature." *Id.* The court held, consistent with *McPherson*, that the Legislature's plenary power under Article II could not be "circumscribe[d]" and therefore concluded that it was "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision." *Id.* at 287.

The New Hampshire high court likewise has emphasized that the procedures enacted by the legislature in the exercise of its plenary authority are not subject to judicial second-guessing. In response to a question concerning the constitutionality of the legislature's provision for absentee voting, the court pointed out that "[t]he whole discretion as to the manner of the appointment is lodged, in the broadest and most unqualified terms, in the legislature." *In re Opinions of Justices,* 45 N.H. 595, 1864 WL 1585, at *5 (N.H. July 19, 1864). The plenary nature of the legislature's power excluded any role for the court: "We have not found it easy to see what valid legal objections there can be to this exercise of the

unlimited authority given by the Constitution . . . ." *Id. See also In re Opinion of the Justices,* 113 A. 293, 298 (N.H. 1921) (reaffirming the court's 1864 opinion and holding that "[a]s the manner of making the appointment is left to the Legislature of each state, there can be no constitutional objection to the scheme now proposed").[7]

The limited federal case law confirms the limited role of the state judiciary and the plenary authority of the state legislature. The decision in *Case of Electoral College,* 8 F. Cas. 427 (C.C.D.S.C. 1876) (partially unpaginated), an extraordinary habeas corpus case arising out of the disputed presidential election of 1876, demonstrates that a state court's interference in a dispute concerning the appointment of electors clearly abridges the state legislature's preeminent authority under Art. II, § 1, cl. 2. South Carolina law vested state election officials with the authority not only to collect and tabulate votes, but also to decide "all cases under protest and contest that may arise," and to certify their determination of the election to the secretary of state by a certain date. *See id.* at 431. The officials' resolution of such protests and issues as arose evidently displeased some elements within the South Carolina government, because the state supreme court ordered the officials simply to aggregate the local returns and to report the total, without looking beyond the face of the returns or considering any protests or contests. After the officials had certified their determination of the election in accordance with their independent performance of their statutory duties, the

[7] *See also* 10 Annals of Cong. 131-146 (1800) 130 (Sen. Pinckney: "if it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it").

state supreme court ordered them to certify a contrary determination. When the officials refused on the ground that having adjourned *sine die* pursuant to statute, they no longer constituted a canvassing board and had no authority to do as the court ordered, the court held them in contempt and imprisoned them.

The federal court granted the writ of habeas corpus. The federal court first held that the officials' actions were "in pursuance of a law of the United States," *id.* at 434, because the officials' powers and duties under the statutes of South Carolina were "derived directly" from Art. II, § 1, cl. 2, *id.* at 432. The South Carolina legislature, "in obedience to that provision, ha[d] by law directed the manner of appointment of the electors," and "that law ha[d] its authority solely from the constitution of the United States." *Id.* at 433. The corollary of the court's holding that the officials' actions were authorized by Article II was that "the whole matter was beyond the jurisdiction of the supreme court" and the officials "were in no wise subject to the control . . . of the judicial department." *Id.* at 433-34. The state supreme court's attempts to interfere with the officials' performance of their statutory duties therefore were void, and the officials were entitled to release.[8]

Although since the *Case of Electoral College* the federal courts have not directly addressed an effort by a state court to usurp a state legislature's authority under Art. II, § 1, cl. 2, a

[8] While the federal court's opinion is not explicit, the habeas petitioners appear to have certified the electors for Hayes and the state supreme court appears to have ordered them to certify the electors for Tilden. *See* W. Josephson & B. Ross, *Repairing the Electoral College,* 22 J. Legis. 145, 185 (1996). The disputed resolution of protests may have concerned fraud or intimidation directed at pro-Hayes black voters. *See id.* at 185 n.299.

number of subsequent cases have emphasized the primary role of state legislatures in election matters. In other election contexts, even in the absence of a clear textual delegation of authority to state legislatures, this Court has emphasized the primary role of state legislatures in remedying constitutional violations. For example, while this Court has found apportionment disputes justiciable, it also has counseled deference and left questions of remedy to state legislatures. *See, e.g., WMCA, Inc. v. Lomenzo,* 377 U.S. 633, 655 (1964). Several Justices expressed similar concerns in the context of presidential elections in *Williams v. Rhodes. See* 393 U.S. at 40 (Douglas, J., concurring) ("The relief asked is of such a character that we properly decline to allow the federal courts to play a disruptive role in this 1968 state election."); *id.* at 48 (Harlan, J., concurring in the result) ("Since Ohio's requirement is so clearly disproportionate to the magnitude of the risk that it may properly act to prevent, I need not reach the question of the size of the signature barrier a State may legitimately raise against third parties on this ground. This should be left to the Ohio Legislature in the first instance.").

B. The Decision Below Violated Article II, Section 1, Clause 2 By Usurping the Florida Legislature's Authority.

Pursuant to its authority and responsibility under Art. II, § 1, cl. 2, the Florida Legislature has enacted a comprehensive statutory scheme governing the manner in which Florida's electors shall be appointed. As detailed above, Art. II, § 1, cl. 2, obligated the Florida Supreme Court to respect the Legislature's exercise of its plenary power. In the decision below, however, the Florida Supreme Court disregarded that obligation and created entirely new rules of law to govern the appointment of Florida's electors. The court below identified

a statutory conflict where none existed, purported to resolve that illusory conflict by imposing a rule directly contrary to the rule mandated by the statute, ignored clear statutory deadlines, and created new deadlines out of whole cloth. This exercise of court-claimed "equitable" power is incompatible with the Florida Legislature's plenary authority and Art. II, § 1, cl. 2 of the Constitution. The decision below does not reflect a customary exercise in statutory interpretation. To the contrary, the court below rewrote the relevant statutes in a manner that clearly usurped the Florida Legislature's authority under Art. II, § 1, cl. 2.

The plain terms of Fla. Stat. § 102.111 expressed the clear will of the Florida Legislature and should have resolved this dispute. That provision directs the Elections Canvassing Commission, the body that the Legislature charged with "certify[ing] the returns of the election and determin[ing] and declar[ing] who has been elected for each office," to reject late returns and to certify the election based on timely returns. *Id.* It provides that if any counties' returns "are not received by the Department of State by 5 p.m. of the seventh day following an election, *all missing counties shall be ignored*, and the results shown by the returns on file shall be certified." *Id.* (emphasis added). The Secretary of State did no more than obey this statutory command when she sought to certify the election based on the results submitted to the Commission by 5 p.m. on November 14, 2000.

The court below, of course, overrode this statutory deadline and imposed its own deadline of November 26, a date of its own invention. In so doing, the court below relied on its belief that "the mandatory language in section 102.111 conflicts with the permissive language in 102.112." Pet. App. at 17a. In reality, no such "conflict" exists. Section 102.112,

the provision appearing immediately after § 102.111's directive to the state Commission, is addressed to the various counties' canvassing boards. Whereas § 102.111 specifies the duties of the Commission, § 102.112 spells out the duties of the county canvassing boards. In perfect harmony with § 102.111, § 102.112 provides that county canvassing boards "must . . . file[ ]" returns with the Secretary of State "by 5 p.m. on the 7th day following the . . . general election." After specifying the county boards' duty and deadline, § 102.112 puts the boards on notice of the consequences that may ensue if the boards fail to comply. Section 102.112 informs the boards that if they fail to file their returns by the statutory deadline, they will incur personal fines and any late-filed returns "*may* be ignored" by the Commission. *Id.* (emphasis added).

These provisions are directed to different entities and perform different functions. Accordingly, there is no conflict. The one provision imposes a mandatory duty on the statewide Commission. The other imposes a duty on county boards and warns them of the consequences of their failure to comply with that duty. Both provisions mandate the identical deadline. The fact that the latter warning is less categorical than it could be, does not deprive the specific direction to the statewide Commission of its mandatory character. For these reasons, a proper interpretation of Florida law would have rejected the asserted conflict as illusory and interpreted § 102.111's mandatory direction to the statewide Commission to mean what it says.

This would be the correct answer as a matter of statutory interpretation even if the federal Constitution did not supply an independent reason for state courts to abide by the state legislature's will, and even if principles of constitutional

avoidance did not favor a construction that avoided a potentially difficult constitutional question. In reality, however, Art. II, § 1, cl. 2, requires state courts to honor the expressed legislative will concerning the process of the appointment of electors, and principles of constitutional avoidance counsel in favor of accepting a construction that conforms as closely as possible to the expressed legislative will. Under these circumstances, the misconstruction of the Florida statutes by the court below cannot stand.

Of course, even if (contrary to fact) there were a "conflict" between § 102.111's mandatory provision and § 102.112's permissive provision, no justification can be imagined for the court's "solution." The court resolved a purported conflict between directives that the Commission "shall ignore" late-filed results and that the Commission "may ignore" late-filed results, by holding that the Commission "shall *not* ignore" late-filed results. Whether or not the Commission always is *required* to ignore late-filed results, the court's holding that the Commission is *forbidden* to ignore late-filed results blatantly rewrites the Legislature's handiwork.

The court further belied its professions of "reluctance to rewrite the Florida Election Code," Pet. App. at 37a, by arrogating the authority to impose a new deadline to replace the deadline specified by the Legislature and obliterated by the court's own "interpretive" exercise. Based on its "equitable" conception of reasonableness, *see id.*, the court unveiled its own scheme to determine the appointment of Florida's electors. Paying no heed to the Legislature's pre-election exercise of its plenary power under Article II, the court conducted its own weighing of the interests in finality and accuracy embodied in the Legislature's express deadline mandate. The court extended the Legislature's November 14th

deadline to November 26th to allow what the court considered to be "a fair and expeditious resolution of the questions presented" in the present dispute over the appointment of Florida's electors. Pet. App. at 38a. That was an exercise of judicial legislation, not statutory interpretation.

Of course, even a blatant exercise of judicial lawmaking by a state court under the guise of the interpretation of a state statute would not justify this Court's intervention, absent a violation of a federal right. But as explained above, Art. II, § 1, cl. 2's delegation of preeminent authority over the appointment of federal electors to the state legislature converts an otherwise merely regrettable exercise in judicial lawmaking into a constitutional violation. In the context of a federal election for the appointment of electors,[9] this Court possesses jurisdiction to correct the Florida Supreme Court's misinterpretation and to vindicate Petitioner's and Amici's rights to have electors appointed pursuant to the laws enacted by the Florida Legislature. This Court should reject the interpretation of the Court below and construe § 102.111's mandatory provision to mean what it says. That interpretation avoids a constitutional violation and vindieates rights claimed

[9] By vindicating the federal constitutional right to have the appointment of presidential electors determined as directed by the state legislature, this Court would not necessarily disturb the Florida Supreme Court's misinterpretation of § 102.111 when it comes to state elections. This Court possesses jurisdiction only to vindicate federal constitutional rights, which in the unique context of Art. II, § 1, cl. 2, requires state courts to interpret state law concerning the appointment of electors correctly. This Court enjoys no general jurisdiction to correct misinterpretations of state law solely for the sake of error correction.

under the federal Constitution.[10]

III. SECTION FIVE OF TITLE THREE PREVENTS THE FLORIDA SUPREME COURT FROM REWRITING THE LAWS GOVERNING THE APPOINTMENT OF ELECTORS AFTER ELECTION DAY

As demonstrated above, the Constitution specifically grants state legislatures the plenary and exclusive authority to appoint electors. U.S. Const., Art. II, § 1, cl. 2. In accordance with this constitutional command, Congress has vested state legislatures with the authority to prescribe the procedures for appointing electors. *See* 3 U.S.C. §§ 2, 5, 7. Federal law – both constitutional and statutory – therefore clearly vests state legislatures, not state courts, with the sole authority to set the procedures governing the appointment of electors.

A number of provisions of federal law reflect the preeminent role of state legislatures. For example, 3 U.S.C. § 2 recognizes the state legislature's authority, in a case when the State fails to make a valid choice on election day, to

[10] The blatant nature of the Florida Supreme Court's error obviates the need to decide whether a state court's interpretation of a state law concerning the appointment of electors need be grievously wrong or merely erroneous to justify this Court's intervention. Amici submit, however, that this Court possesses jurisdiction to vindicate any error in the interpretation of such laws for at least two reasons. First, Art. II, § 1, cl. 2 gives Petitioner and Amici a right to have electors appointed as directed by the state legislature. Close does not count. Second, laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, are properly construed as federal law, rather than state law. *See Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876). Accordingly, deference or a demand for a particularly egregious violation play no role. Of course, even though this Court possesses jurisdiction to correct all errors, it can limit its exercise of that jurisdiction to cases, like this one, that involve egregious misinterpretations of state law (and, therefore, clear violations of federal rights).

appoint electors "*in such a manner as the legislature of such State may direct.*" (emphasis added); *see also* 3 U.S.C. § 7 (granting state legislatures authority regarding the meeting and voting of electors). Congress has recognized that the Constitution vests state legislatures, not state courts, with the authority to frame such election procedures.

Congress not only recognizes the preeminence of state legislatures, it also reinforces the value of setting election rules before election day. *See* 3 U.S.C. § 5. That section states in pertinent part: "If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors* [this year, November 7th] for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State . . . such determination made pursuant to such law so existing on said day. . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution." (emphasis added).

This section ensures that if a State has a procedure in place before election day, a determination made in any controversy pursuant to that procedure "shall be conclusive, and shall govern in the counting of electoral votes." 3 U.S.C. § 5. Here, the Florida Supreme Court has usurped the Florida Legislature's authority by "enacting" new law after the election to replace the governing law that was duly enacted by the Florida Legislature prior to election day. These actions by the Florida Supreme Court violate not only Article II, § 1, cl. 2 of the United States Constitution but also 3 U.S.C. § 5.

A. The Florida Supreme Court Impermissibly Rewrote the Law Governing the Appointment of Electors After Election Day.

The Florida Legislature enacted a procedure long *before* election day to govern the appointment of the electors. The

decision below rewrote those procedures long *after* the votes were cast. That post-hoc judicial lawmaking violated Art. II, § 1, cl. 2 and 3 U.S.C. § 5, as well as the broader maxim that "[e]lections belong to the political branch of the government and . . . are beyond the control of judicial power." *Roe v. Alabama*, 43 F.3d 574, 577 (11th Cir. 1995).

The Florida Legislature has enacted detailed provisions governing elections. Those statutes include provisions for "final determination of any controversy or contest concerning the appointment of any or all electors. . . ." *See* 3 U.S.C. § 5. The Florida Legislature follows 3 U.S.C. § 1 in identifying the date for the appointment of Presidential electors. *See* Fla. Stat. § 103.111. As noted above, Florida law also provides for a November 14th deadline for the filing of returns with the state-wide election Commissioner and directs the Commission that any late-filed returns "shall be ignored." *See* Fla. Stat. § 102.111.

In sum, the Florida Legislature has put in place a detailed procedure that governs elections. The decision below ignored this procedure in favor of a system of the Court's own devising that was not promulgated until after the statutory deadline had passed. This post-election rewriting of the rules by the Florida Supreme Court has created disarray by changing the rules after the game was over.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). A key element to any system of fair

elections is that the governing authority – here, the Florida Legislature pursuant to Art. II, § 1, cl. 2 – must set the rules in advance. Senator Samuel Smith colorfully described the obvious and special dangers of such a post-election "law to be passed for the occasion" almost two centuries ago in the context of the disputed election of 1800. 1 Dec. 1803, Annals 13:129 (reprinted in 5 Founders' Const. at 453). Senator Smith warned that if it had been attempted to "elect[ ] a President by a law to be passed for the occasion, . . . the person, whoever he might have been, would have met the fate of an usurper, and his head would not have remained on his shoulders twenty-four hours." *Id.* The Florida Supreme Court disregarded both the substantial regulations set in place by the Florida Legislature and the substantial dangers of such retroactive lawmaking in its decision below.

The Court substantially rewrote the statutory provisions for final resolution of controversies and contests in four ways: by changing the mandatory deadline for county canvassing returns to be submitted; by eliminating the Department of State's discretion regarding the acceptance of late returns; by changing the time-line for pre-certification challenges; and by changing the time-line for post-certification challenges.

First, the Florida Supreme Court ignored the Florida Legislature's November 14th deadline in favor of its own deadline of 5:00 p.m. on November 26th. *See* Pet. App. at 38a. The court attempted to justify this decision based on the illusory conflict discussed above. The court's exploitation of a supposed conflict between a direction that late-filed results "shall be ignored" and that such results "may be ignored" to impose a requirement that such results "shall *not* be ignored" defies justification.

However, the Florida Supreme Court's post-hoc exercise

in judicial lawmaking did not end there. In addition to rewriting existing Florida law on certification, the Florida Supreme Court also rewrote deadlines set by the Florida Legislature regarding election challenges. Florida law sets out two procedures for challenging election results. First, before certification, an election "protest" may be lodged with the county canvassing board. Fla. Stat § 102.166. Such a protest must be lodged "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later." Fla. Stat. § 102.166(2). Accordingly, by rewriting the certification deadline from November 14th to the 26th, the court below also rewrote the deadline for filing election protests.

The Florida Legislature also has prescribed the method for conducting a post-election "contest." Section 102.168 allows a complaint to be filed within 10 days after the last county canvassing board certifies its results or within 5 days after a specific canvassing board certifies its results following a protest pursuant to 102.166(1), whichever is later. This provision recognizes the necessity of certifying results in a timely manner to allow sufficient time for this post-election challenge. Florida statutes require an immediate hearing in a post-election challenge, but also set forth the time for the development of the litigation. A complaint must be filed within ten days after the certification and ten additional days are allotted for an answer. *See* Fla. Stat. § 102.168(2), (6). Of course, the courts must also allow for any necessary pleadings and discovery.

With a congressionally-imposed deadline of December 12th to conclude any election protest, *see* 3 U.S.C. §§ 5 and 7, any ongoing election challenge that precludes a final certification

jeopardizes the inclusion of Florida's electoral votes. By moving the certification date, the Florida Supreme Court cut the time period to litigate a post-election challenge nearly in half, from twenty-nine days to only fifteen days. In light of the relatively brief time period between the federally specified dates for the election and final appointment of electors, the selection of deadlines necessarily requires a balancing of trade-offs. Allowing more time for pre-certification recounts and protests allows less time for post-certification contests. Certain kinds of challenges, such as those involving voter fraud or intimidation, may be better suited for a post-election contest and cannot be remedied by a recount in any event. Accordingly, the setting of deadlines necessitates delicate policy judgments.

Art. II, § 1, cl. 2, delegates those policy judgments to the Florida Legislature and 3 U.S.C. § 5 requires those policy judgments to be made before election day. By rewriting the certification date, the Florida Supreme Court reconsidered all the Florida Legislature's judgments concerning these timing issues and violated both of these provisions of federal law.

B. In Light of Art. II, § 1, cl. 2 and 3 U.S.C. § 5, It Makes No Sense to Allow the Florida Supreme Court To Rewrite the Law Governing the Appointment of Electors After Election Day.

As explained above, Art. II, § 1, cl. 2 prevents the Florida Supreme Court from usurping the Florida Legislature's authority to direct the appointment of electors, and 3 U.S.C. § 5 imposes an additional federal obstacle to judicial lawmaking after election day. Together these two provisions clearly belie the proposition necessarily advanced by Respondents: that the Florida Supreme Court possesses the exclusive authority – to the exclusion of both this Court and

the Florida Legislature – to dictate the content of the law governing the appointment of electors after election day. This suggestion turns federal law on its head.

Art. II, § 1, cl. 2 clearly gives state legislatures a preeminent role in determining the appointment of electors. Section 5 then imposes a sensible non-retroactivity principle. Courts generally interpret statutes in a manner that sets their meaning retroactively. That, however, does not permit state courts to escape the limitations imposed by the Constitution and federal law. Respondents' implicit theory is that when a state court errs in interpreting statutory provisions for appointing electors it neither usurps legislative authority nor creates new law. In fact, such an erroneous decision does both, in clear violation of Art. II, § 1, cl. 2, and 3 U.S.C. § 5.

Respondents' view ignores constitutional text and history. It takes the one branch of state government the Framers thought wholly unsuited for direct participation in the appointment of electors and not only gives it pride of place, but insulates its errors from review. Respondents' view makes hash out of a straightforward delegation of the primary authority over the appointment of electors to state legislatures. The Constitution authorizes this Court to review and correct erroneous judicial constructions of statutory provisions governing the appointment of electors. This Court should exercise that authority and correct the Florida Supreme Court's erroneous decision or defer to the authority of the Florida Legislature to vindicate the meaning of its election laws as they were written.

CONCLUSION

For the foregoing reasons, and those expressed in Petitioner's Brief, this Court should reverse the judgment below.

Respectfully submitted,

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November 28, 2000.

ADDENDUM

Participating *Amici*

The following individuals, who reside in Florida, voted on November 7, 2000, in Florida, in the presidential election contest, and are amici whose interests are presented for the Court's consideration in this brief:

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